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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9                   JAMALL BAKER,

10                  Plaintiff,

11                  Case No. C17-1678-RSL-MAT

12                  v.

13                  ORDER DIRECTING CLERK TO  
14                  JERALD GRANT, et al.,  
15                  Identify PRO BONO COUNSEL

16                  Defendants.

17                   I.           INTRODUCTION

18                  Plaintiff, an inmate in the Monroe Correctional Complex Special Offender Unit (“MCC-SOU”), is proceeding *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 civil rights action. The two remaining defendants are MCC-SOU employees: Correctional Officer Jerald Grant and Unit Supervisor Jason Neely. Currently before the Court is plaintiff’s motion to appoint counsel for the limited purpose of conducting an evidentiary hearing on the issue of whether plaintiff exhausted his First Amendment retaliation claim against Officer Neely. Defendants oppose the motion. Having considered the parties’ submissions, the balance of the record, and the governing law, the Court grants plaintiff’s motion contingent upon the identification of counsel willing to represent plaintiff pro bono for the limited purpose identified herein.

## **II. BACKGROUND**

A. **Allegations in Plaintiff's Second Amended Complaint**

The operative complaint alleges the following.<sup>1</sup> Plaintiff has been diagnosed with paranoid schizophrenia, paranoid personality disorder, schizoaffective disorder, and bipolar disorder. (Dkt. 24-2 at ¶¶ 2-3.) On countless occasions between 2014 and 2017, Officer Grant falsely announced to staff members that plaintiff has HIV/AIDS. (*Id.* at ¶¶ 24-25.) In April 2015, Officer Grant told an inmate that plaintiff was “HIV/AIDS positive” and a snitch from California who was in the witness protection program. (*Id.* at ¶¶ 7-8.) Officer Grant spread similar rumors among inmates at other times, too. (*Id.* at ¶¶ 57-58.)

Plaintiff asked Officer Grant to stop spreading rumors about him or he would litigate. (*Id.* at ¶¶ 32-33.) Officer Grant responded, “So what, you are a paranoid schizophrenic, a judge will never believe you over me. . . . I don’t care, do something while you can.” (*Id.* at ¶¶ 33-34.) After plaintiff began to complain about Officer Grant’s behavior, the officer told him that he would be transferred to another institution and away from his family if he continued to write grievances and file litigation regarding the alleged comments. (*Id.* at ¶¶ 10-13.) Officer Grant also instructed two inmates to threaten plaintiff with transfer if he continued to file grievances regarding the alleged comments and actions. (*Id.* at ¶ 14.)

In February 2017, plaintiff requested and was granted a meeting with Sergeant Clayton, who is Officer Grant's supervisor, Officer Grant, and Officer Neely. (*Id.* at ¶¶ 50-51.) During the meeting, plaintiff and Officer Grant discussed the claims in this action; Sergeant Clayton and Officer Neely were completely quiet. (*Id.* at ¶¶ 52-53.) Officer Grant agreed to stop spreading rumors about plaintiff having HIV/AIDS and being in witness protection. (*Id.* at ¶¶ 54-56.) Officer

<sup>1</sup> The Court includes only allegations relevant to the remaining claims in the lawsuit.

1 Grant, however, did not stop. (*Id.* at ¶¶ 57-58.)

2 On April 7, 2017, Officer Neely placed plaintiff in administrative segregation because  
3 plaintiff filed a personal restraint petition about Officer Grant. (*Id.* at ¶¶ 59, 61.) Officer Neely  
4 told plaintiff, “Since you like writing grievances and complaints, I’m sending you to the hole.  
5 Write your complaints from there.” (*Id.* at ¶ 64.) Officer Neely fabricated another explanation to  
6 justify his actions. (*Id.* at ¶¶ 60, 62, 63.)

7 Based on the foregoing allegations, the Court allowed plaintiff to go forward with a First  
8 Amendment retaliation claim against Officer Grant for threatening to have him transferred if he  
9 continued to write grievances, a First Amendment retaliation claim against Officer Neely for  
10 placing plaintiff in administrative segregation because plaintiff filed a lawsuit against Officer  
11 Grant, and an Eighth Amendment claim against Officer Grant based on spreading rumors that  
12 plaintiff has HIV/AIDS and is a snitch. (Dkt. 40 at 1; Dkt. 33 at 6-7, 9-12, 14.)

13 B. Relevant procedural history

14 In September 2018, defendants moved for summary judgment, arguing that plaintiff failed  
15 to exhaust his administrative remedies as required by the Prison Litigation Reform Act (“PLRA”).  
16 (Dkt. 51.) Under the PLRA, a prisoner must exhaust “available” administrative remedies before  
17 filing suit. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006); *Albino v. Baca*, 747 F.3d 1162, 1165 (9th  
18 Cir. 2014) (en banc); 42 U.S.C. § 1997e(a). Defendants bear the initial burden of showing that  
19 there was an available administrative remedy and that plaintiff did not exhaust that remedy.  
20 *Albino*, 747 F.3d at 1169, 1172. Once that showing is made, the burden shifts to plaintiff, who  
21 must either demonstrate that he, in fact, exhausted administrative remedies or “come forward with  
22 evidence showing that there is something in his particular case that made the existing and generally  
23 available administrative remedies effectively unavailable to him.” *Albino*, 747 F.3d at 1172. The

1 ultimate burden, however, rests with defendants. *Id.*

2 Summary judgment is appropriate if the undisputed evidence, viewed in the light most  
3 favorable to plaintiff, shows a failure to exhaust. *Id.* at 1166, 1168; *see Fed. R. Civ. P. 56(a).* If  
4 summary judgment is denied, disputed factual questions relevant to exhaustion should be decided  
5 by the judge at a pretrial evidentiary hearing; plaintiff is not entitled to a jury trial on the issue of  
6 exhaustion. *Albino*, 747 F.3d at 1170-71. But if the Court finds that plaintiff exhausted his  
7 administrative remedies, that administrative remedies were not available, or that the failure to  
8 exhaust administrative remedies should be excused, the case proceeds to the merits. *Id.* at 1171.

9 The Court recommended that defendants' motion for summary judgment be granted in part  
10 and denied in part. (Dkt. 66.) With respect to Officer Grant, the Court concluded that plaintiff  
11 exhausted his Eighth Amendment claim but failed to exhaust his First Amendment claim. (*Id.* at  
12 9, 11-12.) With respect to Officer Neely, the Court concluded that disputed issues of material fact  
13 prevented it from deciding on summary judgment whether plaintiff failed to exhaust his  
14 administrative remedies or whether the administrative remedies were "unavailable." (*Id.* at 10.)  
15 The Court explained:

16 On one hand, defendants have presented evidence that plaintiff did not exhaust his  
17 administrative remedies because they have no record of his alleged rewrite, kite, or  
18 two appeals. On the other hand, plaintiff avers that he submitted these documents,  
19 and he suggests that if the grievance coordinator did not receive them, it was  
20 because a corrections officer failed to follow MCC-SOU policy and put them in the  
locked grievance box after plaintiff slipped them under his door. *See Nunez v.  
Duncan*, 591 F.3d 1217, 1229 (9th Cir. 2010) ("Where prison officials have  
effectively prevented a prisoner from using the available procedures . . . courts have  
held that administrative remedies were not 'available' for purposes of the PLRA.").

21 (*Id.* at 10-11.) The Court thus determined that it would be necessary to hold an evidentiary hearing  
22 on the issue of exhaustion of plaintiff's retaliation claim against Officer Neely. (*Id.* at 11.)

23 The Honorable Robert S. Lasnik adopted the Court's Report and Recommendation and re-

1 referred the matter to the undersigned for further proceedings, including the scheduling of an  
2 evidentiary hearing on the issue of whether plaintiff exhausted his retaliation claim against Officer  
3 Neely. (Dkt. 72.) The Court subsequently granted plaintiff 30 days to file a motion to appoint pro  
4 bono counsel. (Dkt. 77.) The Court informed plaintiff that upon receipt of such a motion, the  
5 Court would seek to appoint pro bono counsel “*for the limited purpose of preparing for and*  
6 *conducting the evidentiary hearing on the question of exhaustion.*” (*Id.* at 2 (emphasis in original).)  
7 Plaintiff timely moved for the appointment of counsel. (Dkt. 79; *see also* Dkts. 82, 83.)  
8 Defendants opposed the motion. (Dkt. 81.)

9 Defendants then filed a motion for summary judgment addressing the merits of plaintiff's  
0 claims. (Dkt. 84.) Given this motion, it was unclear whether defendants intended to waive their  
1 argument that plaintiff failed to exhaust his retaliation claim against Officer Neely. (*See* Dkt. 93.)  
2 The Court ordered defendants to notify the Court whether they intended to waive their exhaustion  
3 argument, in which case it would be unnecessary for the Court to hold an evidentiary hearing. (*Id.*  
4 at 2.) Defendants have informed the Court that they do not waive their exhaustion argument. (Dkt.  
5 96.)

6 Also pending are several miscellaneous motions filed by plaintiff, including a motion to  
7 continue the noting date for defendants' motion for summary judgment to allow plaintiff time to  
8 conduct additional discovery and respond. (Dkt. 91.)

### III. DISCUSSION

Generally, a person has no right to counsel in a civil action. *See Campbell v. Burt*, 141 F.3d 927, 931 (9th Cir. 1998). In certain “exceptional circumstances,” the Court may request the voluntary assistance of counsel for indigent civil litigants under 28 U.S.C. § 1915(e)(1). *Agyeman v. Corrections Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). When determining whether

1 “exceptional circumstances” exist, the Court considers “the likelihood of success on the merits as  
2 well as the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the  
3 legal issues involved.” *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Neither factor is  
4 dispositive, and they must be viewed together before reaching a decision on a request for counsel.

5 *Id.*

6 In this case, plaintiff has made serious allegations that his administrative remedies were  
7 unavailable when he tried to exhaust his First Amendment retaliation claim against Officer Neely.  
8 Although defendants deny plaintiff’s claims, there are disputed issues of material fact that  
9 precluded summary judgment and now require an evidentiary hearing on the question of  
10 exhaustion. Although plaintiff has sufficiently articulated his claims thus far, the Court concludes  
11 that the complexity of preparing for and participating in an evidentiary hearing will make it  
12 difficult for him to proceed *pro se* with this aspect of the litigation. The Court thus finds  
13 exceptional circumstances warrant the appointment of counsel in this matter *for the limited*  
14 *purpose of preparing for and conducting the evidentiary hearing on the question of exhaustion.*  
15 Plaintiff is advised, however, that there is no guarantee pro bono counsel will be identified.  
16 Therefore, the motion for appointment of counsel will be granted contingent upon the  
17 identification of counsel willing to represent plaintiff pro bono for the limited purpose.

18 In addition, defendants’ motion for summary judgment on the merits (Dkt. 84) will be held  
19 in abeyance pending resolution of the exhaustion issue. The Clerk will be directed to remove the  
20 motion from the Court’s calendar at this time. After the evidentiary hearing is concluded, the  
21 Court will invite further briefing on the summary judgment motion and will place the motion back  
22 on the calendar for consideration. Given this conclusion, the Court will deny as moot plaintiff’s  
23 motion for an extension of time to conduct discovery and respond to the summary judgment motion

1 (Dkt. 91).

2                          IV.        CONCLUSION

3                          For the reasons explained above, the Court finds and ORDERS:

4                          (1) Plaintiff's motion to appoint counsel (Dkt. 79) is GRANTED contingent upon the  
5 identification of counsel willing to represent plaintiff pro bono for the limited purpose of preparing  
6 for and conducting an evidentiary hearing on the issue of exhaustion of plaintiff's First  
7 Amendment retaliation claim against Officer Neely.

8                          (2) The Clerk is DIRECTED to identify counsel from the Pro Bono Panel to represent  
9 plaintiff for the limited purpose identified herein. Upon the identification of pro bono counsel, the  
10 Court will issue an order appointing counsel and directing the parties to file a joint status report.

11                         (3) Defendants' motion for summary judgment on the merits (Dkt. 84) will be held in  
12 abeyance pending resolution of the exhaustion issue. The Clerk is directed to REMOVE the  
13 motion from the Court's calendar at this time. After the evidentiary hearing is concluded, the  
14 Court will invite further briefing on the summary judgment motion and will place the motion back  
15 on the calendar for consideration.

16                         (4) Plaintiff's motion for extension of time to conduct discovery and respond to the  
17 motion for summary judgment (Dkt. 91) is DENIED as moot.

18                         (5) The Clerk is directed to send copies of this order to the parties and to the Honorable  
19 Robert S. Lasnik.

20                         Dated this 2nd day of May, 2019.

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23                         Mary Alice Theiler  
                               United States Magistrate Judge